

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	
)	
STAR DEVELOPMENT GROUP, INC.)	File No. BNP-20001023ACZ
)	Facility ID No. 129548
For a Construction Permit for a New AM Station)	
at Orlovista, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 2002

Released: July 3, 2002

By the Commission:

1. We have before us the unopposed April 23, 2001, Request of Star Development Group, Inc. (“Star”) for waiver of 47 C.F.R. § 73.3571(b), the “Major Change Rule.”¹ Star requests a waiver of the Major Change Rule in order to allow it to amend its application for a new AM broadcast station at Orlovista, Florida,² after close of the applicable filing window, while retaining the application’s original filing date.³ Star seeks to specify operation of its proposed station on 810 kHz rather than 1120 kHz, as originally filed. For the reasons discussed below, we find that waiver of the rule, under the circumstances of this case, would be in the public interest, and accordingly grant Star’s request for waiver of the Major Change Rule.

2. Background: On January 28, 2000, during the filing window for Broadcast Auction No. 32, Star filed FCC Form 175, a short-form application for a new AM broadcast station on 1120 kHz at Orlovista, Florida.⁴ The proposal was examined solely to determine whether the application was mutually exclusive with any other window-filed application. In accordance with broadcast auction application procedures, the staff did not assess the application’s acceptability, i.e., whether the Orlovista application protected prior-filed and/or outstanding authorizations. In a September 22, 2000, *Public Notice*, Star’s application was placed on a list of non-mutually exclusive applications, and Star was instructed to file

¹ A “major change” is defined under 47 C.F.R. §73.3571(a)(1) as “any change in community of license or in frequency, except frequency changes to non-expanded band first, second or third adjacent channels,” or any change resulting in the original applicant not retaining more than 50 percent ownership. The rule calls for dismissal of such major changes pursuant to Section 73.3571(h)(1)(i), if not filed during a designated filing window.

² File No. BNP-20000128ABV.

³ This matter has been referred to the Commission en banc by the Chief, Media Bureau, pursuant to 47 C.F.R. § 0.283(c).

⁴ The application was timely filed pursuant to the *Public Notice*, “AM Auction Filing Window and Application Freeze,” 14 FCC Rcd 19490 (1999).

in paper form an application on FCC Form 301 specifying the Orlovista facility.⁵ Star submitted its long-form application (FCC Form 301) on October 23, 2000.⁶

3. On November 16, 2000, Florida Broadcasters ("FB"), licensee of station WRMQ(AM), Orlando, Florida, filed a "Motion to Dismiss or Return Application as Unacceptable For Filing" against Star's application. FB argued in its motion that the Star application was unacceptable because it failed to protect FB's prior-filed and cut off September 29, 1999, minor change application to increase WRMQ's daytime power to 5 kW.⁷ It concludes that the Star application should be dismissed for this violation of Section 73.37(a). The FB minor change application was filed on a paper form. Star asserts that the FB application did not appear in the Commission's Consolidated Data Base System ("CDBS") when Star prepared and filed its proposed new station application.⁸ At the time, the Commission was in the process of converting its paper records to electronic form in CDBS.

4. Star seeks to amend its application to specify 810 kHz rather than 1120 kHz, a major change. However, under the Commission's application processing rules, major amendments can only be filed during specified window periods.⁹ Moreover, the submission of a major amendment results in the assignment of a new file number based on the date the amendment is filed.¹⁰ Therefore, acceptance of the 810 kHz amendment after close of the filing window ordinarily would result in the dismissal of Star's application as untimely, pursuant to 47 C.F.R. § 73.3571(b)(1).

5. Discussion: Star contends that it relied upon erroneous information provided by CDBS when it filed its application for 1120 kHz in Orlovista, Florida, asserting that FB's application to increase WRMQ's power, although filed well before the Auction No. 32 filing window, did not appear in CDBS. Star alleges it would have applied for 810 kHz or another available frequency if CDBS had properly listed the FB application record. Star thus seeks a waiver of the Commission's rules to enable it to amend its application to specify 810 kHz, while maintaining its original filing date. Since no other party applied for 810 kHz during the Auction No. 32 filing window, Star contends that grant of its request would neither prejudice any party nor frustrate the underlying purpose of the Major Change Rule. Star further asserts that a waiver would serve the public interest by conserving Commission time and enabling Star to provide first local service to Orlovista.

6. Generally, a waiver of the Commission's rules may be granted upon a showing of "good cause."¹¹ Good cause exists when special circumstances warrant a deviation from the rule, and where

⁵ See *Public Notice*, "AM Auction No. 32 Non-Mutually Exclusive Applications," 15 FCC Rcd 18004 (2000).

⁶ File No. BNP-20001023ACZ.

⁷ File No. BP-19990929ABJ.

⁸ Affidavit of Donald L. Markey, P.E., attached to Star's waiver request.

⁹ 47 C.F.R. § 73.3571(h).

¹⁰ 47 C.F.R. § 73.3522(a)(3).

¹¹ See 47 C.F.R. § 1.3.

deviation serves the rule's underlying purpose as well as the public interest.¹² It is incumbent upon the applicant to plead with particularity the facts and circumstances that would make the general rule inapplicable.¹³

7. Previously, the Commission has held that its databases are an unofficial, secondary source of information that "in a few instances may not agree with the primary source (e.g., the station authorization, application, petition for rulemaking, etc.)."¹⁴ These earlier decisions relied in large part on subsection (e) of Section 0.434 of our rules, which provided that electronic databases were unofficial sources of information.¹⁵ This subsection was dispositive, for example, in *Fetterman*, in which a 1994 application for a Domestic Public Land Mobile Radio Service license was dismissed for failing to protect a co-channel authorization that was not listed in the Commission's licensing database.¹⁶ However, subsection 0.434(e) was deleted in 1998. Further, in 1999 we adopted Section 1.911 of the rules, which establishes the files comprising the Wireless Telecommunications Bureau's Universal Licensing System as the official records for stations in the Wireless Radio Services.¹⁷ These developments put at issue the continuing viability of *Fetterman*.

8. Currently, we require most broadcast applications to be filed electronically.¹⁸ We also increasingly rely upon and promote public access to our electronic databases. FB's application for a minor change to WRMQ was filed on paper, before our transition from paper to electronic filing was completed. Now, electronically filed application records are automatically transferred to CDBS within one day of confirming fee sufficiency. With the transition to mandatory electronic filing substantially

¹² See, e.g., *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) ("*WAIT Radio*").

¹³ See *Tucson Radio, Inc. v. F.C.C.*, 452 F.2d 1380, 1382 (D.C. Cir. 1971); *WAIT Radio*, 418 F.2d at 1157.

¹⁴ See *Public Notice*, "Mass Media Bureau Lists Commercial FM Broadcast Stations Potentially Eligible To Increase Effective Radiated Power On Form 302-FM," 12 FCC Rcd 20351, 20351 n.2 (M.M. Bur. 1997).

¹⁵ See *Application of Robert Fetterman d/b/a RF Communications*, 16 FCC Rcd 8221, 8223 (2001) ("*Fetterman*"). See also *Mobilfone of Northeastern Pennsylvania, Inc.*, 5 FCC Rcd 7414, 7415 (Common Car. Bureau 1990), also relying on 47 C.F.R. § 0.434(e). Former subsection (e) of Section 0.434 read as follows:

Users of the data bases and the lists prepared from the data bases are cautioned that the data bases and the lists are unofficial. They have been prepared for the convenience of the FCC's staff, and should not be relied on by the public because in some instances the data bases and the lists may not agree with the primary sources of information (e.g., official license documents, international notifications, actual applications, and the like). Action by the public, such as the filing of applications, should be based on the primary sources of information and not on the data bases or lists. If there are discrepancies between the primary sources of information and the data bases or lists, the former control.

¹⁶ 16 FCC Rcd at 8221-22.

¹⁷ 47 C.F.R. §§ 1.907, 1.911.

¹⁸ See, e.g., *Public Notice*, "Mass Media Bureau Implements Mandatory Electronic Filing of FCC Forms 302-FM, 316 and 347," 15 FCC Rcd 20368 (M. M. Bur. 2000); *Public Notice*, "Mass Media Bureau Implements Consolidated Database System (CDBS) Electronic Filing of FCC Forms 301, 302, 314, 315, 316 and 347" (M. M. Bur. rel. Apr. 28, 2000).

completed,¹⁹ it is highly unlikely that the fact pattern here, involving a paper application inadvertently omitted from CDBS, can recur. Thus, the facts presented here constitute rare and unusual circumstances.

9. We further find that a waiver of the Major Change Rule in this instance would neither frustrate the rule's underlying purpose nor prejudice any other party. Section 73.3571(h), which limits the filing of new and major modification applications to designated filing windows, prevents applicants from amending their applications after the fact to resolve conflicts with other applicants. For instance, in *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* ("NCE Comparative Standards"),²⁰ the Commission rejected a proposal to permit applicants, determined to be mutually exclusive after window filing, to eliminate the mutual exclusivity by amending their applications to specify an alternate channel for which no one had applied. However, in the instant case, Star does not seek to avoid mutual exclusivity with similarly situated contemporaneously filed applications, but rather with an application filed prior to its window but not properly listed in CDBS.

10. We agree with Star's assertion that under the circumstances present here, and in the absence of a competing application filed during the Auction No. 32 filing window, the public interest requires waiving the Section 73.3571(h) filing prohibition.²¹ We note that, given the issues raised in *National Public Radio v. F.C.C.*,²² absent a waiver Star would face considerable delays in refileing.²³ The public interest would not be served by an indefinite delay of first local service to Orlovista when a solution exists that will expedite such service without prejudicing other applicants. Accordingly, we will permit Star to amend its application from 1120 kHz to 810 kHz after expiration of the original filing window while retaining its filing status. Where, as here, an application is patently defective due to an erroneous or erroneously omitted Commission broadcast database record, and there exists an administratively feasible solution that would not prejudice any other applicant whose application was timely filed, the public interest favors our entertaining a request that we waive our procedural rules to provide relief.

11. We emphasize that our holding here is limited to a request for waiver of *procedural* rules, in this case, the Major Change Rule.²⁴ Moreover, as noted above we expect that as we complete the transition to electronic filing and improve the accuracy of our consolidated databases, situations such as that presented here will arise infrequently at best. Under the facts presented here, the public interest is better served by allowing Star to amend its application and thus expedite the introduction of first local service to the community of Orlovista.

¹⁹ *Public Notice*, "Mass Media Bureau Implements Mandatory Electronic Filing of FCC Forms 301, 314, and 315," 16 FCC Rcd 3989 (M. M. Bur. 2001).

²⁰ 16 FCC Rcd 5074, 5106-07 (2001).

²¹ See footnote 12.

²² 254 F.3d 226 (D.C. Cir. 2001).

²³ Following the *National Public Radio* decision, the Commission postponed FM Broadcast Auction No. 37, and commenced a rulemaking proceeding to formulate new licensing procedures to resolve conflicts between noncommercial educational and commercial broadcast applicants. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 3833 (2002).

²⁴ Cf. *Fetterman*, 16 FCC Rcd at 8223 (Commission will not waive substantive rules and accept application based on alleged database error).

12. Conclusion / Action: We have given Star's waiver request the "hard look" required by *WAIT Radio*, and believe that Star has demonstrated sufficiently special circumstances to warrant the conclusion that strict application of the Major Change Rule would not serve the public interest. Accordingly, Star Development Group, Inc.'s April 23, 2001, Request for Waiver of 47 C.F.R. §73.3571(b) IS HEREBY GRANTED, and its amendment to its application, File No. BNP-20001023ACZ, IS ACCEPTED. The staff will study the amended application and, if acceptable for filing, it will be placed on a CDBS-generated *Public Notice* specifying the date by which petitions to deny the application must be filed. The Motion to Dismiss or Return Application as Unacceptable for Filing, filed November 16, 2000, by Florida Broadcasters IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary